United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1011

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

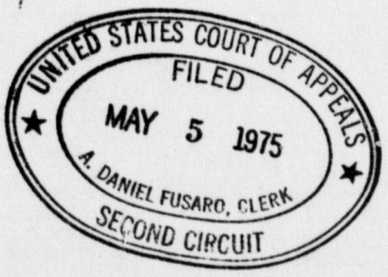
ALPHONSE M. MEROLLA
and THOMAS McNAMARA,

Appellants.

Docket No. 75-1011

REPLY BRIEF FOR APPELLANT
ALPHONSE M. MEROLLA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALPHONSE M. MEROLLA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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In his main brief, appellant argues that the "affect" on interstate commerce does not automatically follow from proof that an accused engaged in extortionate conduct and that interstate commerce is present, that the Government must prove "affect" beyond a reasonable doubt, and that the jury is the appropriate body to evaluate the evidence on that issue.

In response, the Government argues that the Judge was correct when he stated that proof of extortion and interstate

commerce is enough to show affect, and that obstruction or affect on interstate commerce is a complicated issue which must be resolved as a matter of law by the judge.

We take the Government's attempt to justify the court's statement as argument that not only need there not be proof of the element of affect, an unsupportable position (see Point I(B) of appellant's main brief), but also that the court can disregard evidence which goes to refute any implicit inference of affect.*

However, the Supreme Court has made clear that any such irrefutable inference must be mandated by Congress, with appropriate findings. See main brief at 34. Further, the proof here showed there was no actual or potential affect, and the Judge's refusal to consider the evidence violated due process, for it resulted in a conviction despite proof that affect had not been established beyond a reasonable doubt.

The Government argues that depletion of $1,300 and title to the trailer and change of contractor are, per se, interstate commerce. The Government's argument proves too much. The commerce protected by the language of the statute is commerce between the states. A depletion of funds is sufficient to comply with the statute only if it affects actual or potential commerce between the states. The same analysis must apply to a change in

*The Government cites Stirone v. United States, 361 U.S. 212 (1959), to show that the charge given here and the statements by the district judge were correct. It must be noted that the issue considered here was not raised in Stirone, and that in Stirone there was no contradictory evidence.

the ownership of contract rights. The taking from Goberman of $1,300 and title to the trailer had no effect on the interstate commerce. The money for that commerce was given to Goberman with, as the Government acknowledges, controls on its use so that it would be employed for the business in interstate commerce, rather than for Goberman's personal ventures, as McNamara suspected it was being used. There was no diminution of Goberman's buying power. Everything was paid for by McNamara, and further, since the record shows all necessary material was ordered and delivered, Goberman had nothing else to buy. This was not an on-going business with recurring orders and deliveries, as in United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972) (restaurant's continuous orders for food),* or Stirone v. United States, 361 U.S. 212 (1959) (cement plant's continuous purchasing of sand which was stopped whenever a load of sand went unused). The same is true of every case cited by the Government (see Government brief at 32-33). The businesses were on-going establishments such as bars, lounges, liquor stores, and bowling alleys, where the use of funds to meet threats would prevent the use of that money for the materials needed in continuing business.

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*Further, as the Government notes, in Augello there was proof that the money paid came from the store assets. There is not even a hint of that here.

Here, there was a one-shot deal -- when it was finished, the transaction was ended, and McNamara gave Goberman everything he needed for completion of the transaction. Further, as explained in the main brief, change in title to the trailer has no affect on interstate commerce. There is no claim that Goberman's ability to function was in any way affected by the change of title, because he had possession and use of the trailer.

The Government next argues that if McNamara forced Goberman to give up his rights under the contract, this was an affect on interstate commerce. This theory is also unsound. Goberman and McNamara were not dealing with each other in different states -- both were in New York. Thus, the contract was not in interstate commerce. Further, Goberman's non-completion of the building did not produce any result on any other trade between the states. There is no proof that goods shipped from out-of-state to New York were delayed, reordered, or even entered the state due to Goberman's failure to complete the job. Nor is there any proof that any interstate business patterns changed due to Goberman's failure to perform. There is no proof that Goberman's signing away his rights produced any result on the building.

By way of contrast, the cases cited by the Government at 34-35 showed an actual or potential change in interstate business patterns -- delivery of goods or services -- due to the extortionate activities.

The Judge's refusal to consider the evidence which showed that there was no affect resulted in a finding of guilt premised on what is in essence an irrational presumption. See appellant's main brief at 36. Accordingly, one element was not proven, and the judgment was improper. Turner v. United States, 396 U.S. 398 (1970); United States v. Gainey, 380 U. S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943); United States v. Black, Doc. No. 73-3003 (9th Cir., March 11, 1975).

The Government also argues that affect is an issue of law for the judge," gut gives no explanation for this conclusion. Affect must be considered as an element of the crime which is properly placed before the jury with a charge defining affect and requiring the jurors to ascertain whether the evidence they credit shows a consequence or affect. Affect requires a factual analysis. It is not unlike other issues put before the jurors -- constructive possession, proof of mailing, assault or placing in jeopardy, knowledge -- with an instruction that they apply the law to the facts. Even if the facts are not disputed, the jury must determine whether the element is proved. United States v. Howard, 406 F.2d 1131 (2d Cir. 1974); United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972). There is no basis given in the precedents or the Government's brief for any other treatment of the element of affect.

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*Apparently the Government has properly abandoned its position that a jurisdictional element is one for the court.

In support of its position that affect is a legal issue for the court, the Government cites cases in which the issues of materiality or relevancy have been held to be issues of law although they are elements of the crime. However, the courts have made clear that the issues of materiality and relevancy have always been issues of law for the court:

> The question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court, and not of fact for the jury. It usually arises in the ordinary trial of a cause where one party offers evidence and the other objects to it as immaterial, and in that case it would be clear to everyone that the question was for the court. But the question is exactly the same when, on a trial for perjury, the materiality of the alleged false testimony arises.
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> People v. Lem You, 97 Cal. 224, 32 P. 11, 12 (1893), cited in Carroll v. United States, 16 F.2d 951, 954 (2d Cir. 1927).*

The Supreme Court's later expression on this issue is identical:

> The question of pertinency under §102 was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. Green-

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*Carroll is the predecessor for the Second Circuit cases cited in footnote 18 at 37 of the Government's brief.

> leaf on Evidence (13th ed.) §49. Wigmore on Evidence, §§2549, 2550. And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court. Carroll v. United States, 16 F. (2d) 948, 950. United States v. Singleton, 54 F2d. 488. Cothran v. State, 39 Miss. 541, 547.
>
> The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under §102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury.
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> Sinclair v. United States, 279 U.S. 263, 298-299 (1928).

There is no comparable history with respect to the element here involved. The Government's attempt to find support in United States v. Bass, 404 U.S. 336 (1971), is incorrect. (See Government brief, note 21 at 41). All that the Court was doing there was describing the ways in which the Government might meet its burden of proof at a trial.

The issue of affect should have been presented to the jury; in any event, whichever trier of fact was used, it should have considered the evidence which showed there was no affect; the evidence refuted any showing of affect.

CONCLUSION

For the above-stated reasons and the reasons set forth in the main brief for appellant, the judgment below should be reversed and the indictment dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALPHONSE M. MEROLLA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

April 30, 1975

I certify
a copy was
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telephonically
advised:
Dep. [illegible] 4/30/75